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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 ALEX ANG and LYNN STREIT,
16 individually and on behalf of all others
similarly situated,

17 Plaintiffs,

18 v.

19 BIMBO BAKERIES USA, INC.,
20 Defendant.

Case No. 13 Civ. 1196 (WHO)

**PLAINTIFFS' OBJECTIONS TO
DEFENDANT'S REQUEST FOR
JUDICIAL NOTICE**

Date: August 28, 2013

Time: 2:00 p.m.

Department: 2

Judge: Hon. William H. Orrick

1 Plaintiffs Alex Ang and Lynn Streit (collectively, “Plaintiffs”) respectfully submit the
2 following objections to the request for judicial notice (the “Request”) in support of the motion of
3 defendant Bimbo Bakeries, USA, Inc. (“Defendant”) to dismiss Plaintiffs’ amended complaint
4 (“Amended Complaint”). For the reasons set forth herein, pursuant to Fed. R. Evid. 201(e),
5 Plaintiffs respectfully request that the Court decline to take judicial notice of Exhibits 1-22, 30,
6 32, and portions of Exhibit 28.

7 **Exhibits 1-22**

8 Exhibits 1-22 purport to be containers or pictures of containers of food products at issue in
9 this action. There, however, has been no authentication of these exhibits. Defendant submits no
10 sworn statement (or unsworn statement) from a person with personal knowledge regarding these
11 exhibits. With respect to Exhibits 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, and 22, the Request merely
12 states that these exhibits were “provided by the manufacturer.” With respect to Exhibits, 1, 3, 5, 7,
13 9, 11, 13, 15, 17, 19, and 21, the Request says nothing regarding from where these exhibits
14 originate.

15 While Plaintiffs incorporate certain labels of Defendant’s food products in the Amended
16 Complaint by reference, it is entirely unclear if these exhibits accurately reflect the illegal and
17 misbranded labels at issue in this action. Indeed, Defendant concedes that Exhibits 1-4, 9-10, and
18 13-18 are versions of labels that are *different* than those referenced in the Amended Complaint.
19 See Defendant’s Memorandum of Law (“Def. Mem.”) at 6, 13, & 18. Those different labels do
20 not fall within any exception to Fed. R. Evid. 201.

21 Even with respect to the other exhibits that purport to be the labels at issue, Defendant has
22 not provided adequate authentication. It is not clear that these exhibits actually are what
23 Defendant purports them to be. Under Fed. R. Evid. 201(b), the Court “may judicially notice a
24 fact that is not subject to reasonable dispute because it: (1) is generally known within the trial
25 court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
26 accuracy cannot reasonably be questioned.” Exhibits 1-22 do not fall within either of these
27 categories. Regardless, under Fed. R. Evid. 201(c)(2), upon the request of a party, the Court must
28 take judicial notice of an exhibit only where it “is supplied with the necessary information.”

1 “Thus, a party seeking judicial notice must lay a proper foundation for the document and provide
 2 the proper authentication.” *Professional Courier & Logistics, Inc. v. NICA, Inc.*, 2012 WL
 3 1120675, at *2 (E.D. Cal. 2012). “To satisfy the requirement of authenticating or identifying an
 4 item of evidence, the proponent must produce evidence sufficient to support a finding that the item
 5 is what the proponent claims it is.” Fed. R. Evid. 901(a). Defendant has not produced any
 6 evidence sufficient to authenticate Exhibits 1-22. For all these reasons, the Court should decline to
 7 take judicial notice of Exhibits 1-22.

8 **Exhibit 28**

9 Exhibit 28 appears to be a series of different materials from the website of the American
 10 Heart Association (“AHA”) relating to the AHA’s “Heart-Check Mark” program. The Amended
 11 Complaint specifically references an AHA brochure that is included as the last two pages of
 12 Exhibit 28. *See* Amended Complaint at ¶ 72. For that reason, Plaintiffs do not object to the taking
 13 of judicial notice of the existence of those last two pages. The remainder of the materials included
 14 in Exhibit 28, however, are not incorporated by reference in the Amended Complaint and do not
 15 otherwise satisfy the requirements of Fed. R. Evid. 201. Accordingly, the Court should decline to
 16 take judicial notice of those materials. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.
 17 2001).

18 Nevertheless, Defendant argues the remainder of Exhibit 28 “is an appropriate subject of
 19 judicial notice because the American Heart Association is a reputable and respected organization,
 20 whose website plaintiffs relied on in filing the amended complaint, and, thus, the website's
 21 accuracy cannot be reasonably disputed.” Request at 3. As discussed in the Amended Complaint
 22 and Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss, in violation
 23 of Sherman Law and FDA requirements, Defendant’s products bear this Heart-Check Mark
 24 without disclosing that it is a paid endorsement. Amended Complaint at ¶¶ 56-74. The AHA has
 25 a significant financial interest in the use of its endorsements by food manufactures. As alleged, the
 26 AHA is paid significant amounts because their endorsements drive sales of food products,
 27 including those of Defendant. *Id.* Accordingly, as a party with a financial interest in the subject
 28 matter of this litigation, the AHA cannot be considered “a reputable and respected organization”

1 that produces materials, the accuracy of which “cannot be reasonably disputed.” *See, e.g., Carter*
 2 *v. Deutsch Bank Nat. Trust Co.*, 2010 WL 424477, at *1 (N.D. Cal. 2010) (court may not take
 3 judicial notice of the truth of the contents of print-outs from the website of the Delaware Secretary
 4 of State). To that end, these materials have not been authenticated in any way. *See* Fed. R. Evid.
 5 201(c)(2), 901.

6 Further, in support of its motion to dismiss, not only does Defendant ask that the Court take
 7 judicial notice of the existence of these AHA materials, but also of the truth of their contents.
 8 Defendant asks the Court to dismiss Plaintiffs’ claims relating to products bearing the Heart-Check
 9 Mark based on the contents of the materials in Exhibit 28. Specifically, Defendant asserts that the
 10 Heart-Check Mark is not a paid endorsement. Instead, Defendant argues that the AHA merely
 11 receives a fee to cover their certification process and nothing more. Def. Mem. at 16-17. In order
 12 to dismiss claims in the Amended Complaint on this basis, the Court would have to accept
 13 everything in these materials as true, and make findings of fact by accepting Defendant’s
 14 interpretation of these materials. This is something the Court simply cannot do on a motion to
 15 dismiss. *See* Fed. R. Evid. 201; *In re American Apparel, Inc. Shareholder Litigation*, 855 F. Supp.
 16 2d 1043, 1064 (C.D. Cal. 2012). Moreover, at best, these documents are pure hearsay. *See* Fed.
 17 R. Evid. 801(c)(2), 802. For all these reasons, the Court should decline to take judicial notice of
 18 all but the existence of the last two pages of Exhibit 28.

19 **Exhibits 30 and 32**

20 Exhibits 30 and 32 are materials from the FDA published in the Federal Register.
 21 Normally, the Court could take judicial notice of the existence of such documents. Here, however,
 22 Defendant has chosen to only include cherry-picked excerpts from these FDA publications.
 23 Therefore, as included in the Request, these exhibits are not true and accurate copies of documents
 24 of which the Court can take judicial notice. Moreover, to the extent the Court does take judicial
 25 notice of these exhibits, they “are judicially noticeable ‘only for the purpose of determining what
 26 statements are contained therein, not to prove the truth of the contents or any party’s assertion of
 27 what the contents mean.’” *Coalition for Clean Air v. VWR Intern., LLC*, 2013 WL 486287, at *22
 28 n.1 (E.D. Cal. 2013) (quoting *United States v. S. Cal. Edison Co.*, 300 F. Supp. 2d 964, 975 (E.D.

1 Cal. 2004)). For these reasons, the Court should decline to take judicial notice of Exhibits 30 and
2 32.

3 Dated: July 19, 2013

Respectfully submitted,

4
5 /s/ Pierce Gore

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